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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 SANTA ANA DIVISION

AMY BERCAW, RUSSELL WINSETT,
 and TY WOODS, on behalf of themselves
 and all others similarly situated,

Plaintiffs,

vs.

LENDINGTREE, LLC, a Delaware
 limited liability company; NEWPORT
 LENDING CORP., a Nevada corporation;
 SAGE CREDIT CO., a Delaware
 corporation; HOME LOAN
 CONSULTANTS, INC., a California
 corporation; CHAPMAN CAPITAL,
 INC., a California corporation; and
 SOUTHERN CALIFORNIA
 MARKETING CORP., a California
 corporation,

Defendants.

Case No. SACV08-00660 CJC(AN_x)

Related Cases Nos.

SACV08-00756 CJC (AN_x)
 SACV08-00841 CJC (AN_x)
 SACV08-00755 CJC (RNB_x)

**DEFENDANT LENDINGTREE,
 LLC'S MEMORANDUM OF POINTS
 AND AUTHORITIES IN SUPPORT
 OF MOTION TO DISMISS FOR
 IMPROPER VENUE**

[Rule 12(b)(3)]

Date: November 3, 2008
 Time: 1:30 p.m.
 Place: Courtroom 9B

The Honorable Cormac J. Carney

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1 **I. PRELIMINARY STATEMENT**

2 Each Plaintiff in the four putative national class actions related before this
3 Court agreed by binding contract not to sue LendingTree, LLC (“LendingTree”)
4 outside of its home forum, Mecklenburg County, North Carolina. Yet these Plaintiffs
5 have brought these multiple suits in Santa Ana, over 2,000 miles from LendingTree’s
6 Mecklenburg County headquarters. Counsel for LendingTree met and conferred with
7 counsel for Plaintiffs on Wednesday, September 3, 2008 concerning the substance of
8 this Motion. The parties could not come to an agreement. Therefore, LendingTree
9 moves under Federal Rule of Civil Procedure (“Rule”) 12(b)(3) and substantive
10 federal law to enforce the parties’ agreement and to dismiss LendingTree from these
11 actions. As to LendingTree, venue in California is improper.¹

12 Federal law governs the enforcement of forum selection clauses. The United
13 States Supreme Court and the courts of the Ninth Circuit have recognized that forum
14 selection agreements between companies and consumers are prima facie valid. Forum
15 selection agreements make possible the existence of companies like LendingTree –
16 which serves consumers in all 50 States via its website and collects no charge from
17 consumers – and facilitate the orderly judicial review of consumer disputes without
18 the specter of LendingTree being dragged into any court in any state in the country at
19 the whim of any given consumer. Under federal law, unless each Plaintiff can show
20 that the forum selection agreement is unreasonable as to her, LendingTree’s Motion
21 must be granted.

22 Not a single Plaintiff can show that selection of North Carolina as the exclusive
23 forum for litigation is unreasonable. The contract does not select some remote
24 location for the purpose of discouraging suit. Instead, the forum selection clause
25

26 ¹ In the alternative, LendingTree would consent to the transfer under 28 U.S.C.A. § 1404(a) of
27 these actions to the United States District Court for the Western District of North Carolina, which
28 encompasses Mecklenburg County.

1 chooses North Carolina because North Carolina is LendingTree’s principal place of
2 operations. Even a cursory review of the Plaintiffs’ respective home States, spread
3 out across the country, shows why LendingTree must be able to rely on a forum
4 selection clause to centralize litigation close to home. Plaintiffs hail from Florida
5 (*Shaver*), Georgia (*Baker and Woods*), Nevada (*Bercaw*), New York (*Garcia*),
6 Oklahoma (*Winsett*), Pennsylvania (*Swearingen*), Utah (*Larson*), and Virginia
7 (*Paxton-Collins*). *Bercaw* Complaint, 11-13; *Bradley* Complaint, 9-12; *Garcia*
8 Complaint, 9; *Shaver* Complaint, 11. Without an enforceable forum selection clause,
9 LendingTree would be subject to litigation anywhere in the country.

10 Lastly, enforcement of the forum selection clause will not violate any strong
11 public policy of California. **Not one of the nine (9) Plaintiffs is a resident of**
12 **California. None of the Plaintiffs accessed LendingTree’s website while in**
13 **California.** None of LendingTree’s relevant operations is in California. Plaintiffs can
14 state no colorable claim under California’s statutory law. Unlike North Carolina,
15 California has absolutely nothing at stake in this litigation, and there is no suggestion
16 that this dispute cannot be readily resolved by the courts in North Carolina, the forum
17 originally agreed to by Plaintiffs.

18 As a matter of federal law, the forum selection clause must be enforced, and
19 LendingTree dismissed from these actions.

20 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**


21 Each Plaintiff alleges that he or she requested mortgage quotes from the
22 LendingTree website. As an unavoidable part of that process, a user of the
23 LendingTree website must check off a box indicating that he or she “agree[s] to and
24 accept[s]” the Terms of Use Agreement. A copy of the Terms of Use Agreement is
25 made available to the consumer through an online hyperlink. The users acknowledge
26 to LendingTree that they have read and understood the Terms of Use. Declaration of
27 Donald Norton (“Norton Decl.”), Exhibits 1, 2, 5, and 6.

1 While the exact language has undergone minor changes during 2007 and 2008
2 (all of which is described in Exhibit 5, pages 5 and 6, of the Norton Decl.), the form
3 has always required the user to affirmatively check off a box agreeing to the Terms of
4 Use, as below:

5

6 I agree to and accept the LendingTree [Privacy Policy](#), [Lending Disclosures](#), [Affiliated](#)
7 [Business Disclosures](#), and [Terms of Use](#) in [electronic form](#), and acknowledge that my
8 loan request may be sent to [LendingTree Loans](#), an affiliate of LendingTree. I
9 acknowledge that I have read and understand these documents. (Please print
these documents for your records.)

10 ☐ Yes, I agree and want to receive competing offers with no cost and no
11 obligation.

12  [Privacy & Security Protected](#) [Back](#) **SAVE AND CONTINUE**

13

14 The applicant cannot continue in this process without checking off the
15 agreement box. Norton Decl. ¶ 9. Therefore, to take advantage of free services from
16 LendingTree, Plaintiffs each agreed to these Terms of Use.

17 The attached Terms of Use contain a provision selecting the substantive laws of
18 North Carolina as controlling. “This Agreement shall be subject to and construed in
19 accordance with the laws of the State of North Carolina, excluding its conflict of laws
20 principles.” Norton Decl., Exhibit 1, para. 15 and Exhibit 2, para. 15.

21 Further, the Terms of Use select North Carolina as the exclusive forum of suit.
22 In relevant part, the Terms of Use require that, “in any instance of any lawsuit
23 between you and LendingTree, the parties agree that jurisdiction over and venue of
24 any suit shall be exclusively in the state and federal courts sitting in Mecklenburg
25 County, North Carolina.” Norton Decl., Exhibit 1, para. 14 and Exhibit 2, para. 14.

26 Each Plaintiff agreed to the Terms of Use. Each enjoyed LendingTree’s
27 services free of charge. Then LendingTree announced that it had been the victim of
28

1 criminal data theft in Charlotte, North Carolina. Plaintiffs promptly breached their
2 respective agreements with LendingTree and, in an ill-disguised attempt at forum-
3 shopping, sued LendingTree in, of all places, California.

4 Plaintiffs allege no loss of money, and no loss of tangible property, only
5 increased risk of identity theft. In these putative class actions, Plaintiffs seek relief for
6 LendingTree service users throughout the United States, not just users in California.
7 Plaintiffs allege that LendingTree violated the Fair Credit Reporting Act (“FCRA”),
8 15 U.S.C.A. §1681 *et seq.*, California Civil Code §1798.80 *et seq.* (“§1798.80”), and
9 California Business and Professional Code §17200 *et seq.* (“§17200”). Plaintiffs
10 further make a variety of common law claims against LendingTree.

11 Notably, not all Plaintiffs took the same approach. LendingTree faced three
12 other putative class action suits arising from the same events (the “North Carolina
13 Actions”). Each of those actions was properly filed in or transferred voluntarily to the
14 United States Court for the Western District of North Carolina.² LendingTree moved
15 to compel individual arbitration of the claims brought by named Plaintiffs in the North
16 Carolina Actions, based on an arbitration agreement and class action waiver in the
17 Terms of Use. The Plaintiffs in the North Carolina Actions objected that the Terms of
18 Use were unconscionable as a matter of North Carolina law. United States District
19 Court Hon. Frank Whitney disagreed and compelled each of the North Carolina
20 actions to individual arbitration under the Terms of Use. Exhibits “1” and “2” to
21 LendingTree’s Request for Judicial Notice (“RJN”). Judge Whitney found that the
22 Terms of Use constituted a valid, binding, and enforceable contract:

23 Both parties in this case indicated assent to the terms of
24 use...LendingTree by providing the website and the terms and plaintiffs
25 by affirm[atively] checking the box stating that they agreed to those
26 terms.

27 ² *Spinozzi v. LendingTree, LLC*, 3:08-cv-00229-FDW-DCK; *Carson v. LendingTree, LLC*, 3:08-
28 cv-00247-FDW-DCK; *Mitchell v. Home Loan Center, Inc. et al.*, 3:08-cv-00303-FDW-DCK.

1 [RJN, Exhibit “1” at T54:13-16 and Exhibit “2.”]

2 Judge Whitney further rejected North Carolina Plaintiffs’ contention that that
3 the Terms of Use were unconscionable. Judge Whitney found “no facts indicating
4 unfair surprise,” *Id.* at T58:14-15, that “plaintiffs were able to peruse LendingTree’s
5 website at their leisure,” T58:19-20, that plaintiffs had a duty to read before they
6 accepted the Terms of Use, T58:21-59-20, and that “Plaintiffs have not demonstrated
7 a lack of meaningful choice,” as LendingTree “has a number of major competitors,
8 any of which were just as available to Plaintiffs,” T59:21-24.

9 In addition to the actions before this Court and the North Carolina Actions,
10 there is another putative class action filed in the United States District Court for the
11 Northern District of Illinois.³ That action was filed by Larry D. Drury, Ltd., also
12 undersigned counsel urging California as a proper venue for *Bercaw. Garcia*, another
13 case before this Court, was originally filed in New York by a New York Plaintiff and
14 his New York firm. It has since been dismissed and refiled in California. Lastly,
15 there is a proceeding pending before the Judicial Panel on Multidistrict Litigation.
16 Defendants and Plaintiff-movants have argued for pre-trial consolidation in North
17 Carolina; Plaintiff-respondents have urged consolidation in California.

18 Without waiver, LendingTree is not at this point asking this Court to enforce
19 the class action waiver or arbitration provisions of the Terms of Use. LendingTree
20 only asks that these actions be dismissed for failure to comply with the Terms of Use,
21 i.e., for filing litigation outside of Mecklenburg County, North Carolina.

22 **III. LEGAL ANALYSIS: CHOICE-OF-FORUM**

23 **A. Federal Law Determines Enforceability of Forum Selection Clauses.**

24 “Federal law governs the validity of a forum selection clause.” *Argueta v.*
25 *Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996), *citing with approval to*

26
27 ³ *Miller v. Lending Tree LLC*, No. 1:08-cv-2300 (N.D. Ill.).

1 *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).

2 “Moreover, because enforcement of a forum clause necessarily entails interpretation
3 of the clause before it can be enforced, federal law also applies to interpretation of
4 forum selection clauses.” *Manetti-Farrow, Inc.*, 858 F.2d at 513. Therefore, this
5 Motion is based on the well-settled federal substantive law governing forum selection
6 clauses.

7 **B. United States Supreme Court Precedent Recognizes Forum Selection**
8 **Clauses Are Permissible in Situations Like LendingTree’s.**

9 Two United States Supreme Court decisions set the standard for enforcement of
10 forum selection clauses. *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1
11 (1972) (hereafter, “*Bremen*”) and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585
12 (1991) (hereafter, “*Carnival Cruise Lines*”).

13 In *Bremen*, the United States Supreme Court enforced a forum selection
14 agreement that required a commercial dispute to be settled in the courts of England.
15 The Court found that the “correct approach” is “to enforce the forum clause
16 specifically unless [the non-movant] could clearly show that enforcement would be
17 unreasonable and unjust, or that the clause was invalid for such reasons as fraud or
18 overreaching[.]” *Bremen*, 407 U.S. at 15.

19 *Carnival Cruise Lines* expanded the *Bremen* result to consumer contracts. In
20 *Carnival Cruise Lines*, at issue was the enforceability of forum selection provisions
21 printed on the back of cruise tickets. The Court noted that in contrast to the negotiated
22 commercial contract in *Bremen*, “respondents’ passage contract was purely routine
23 and doubtless nearly identical to every commercial passage contract issued by
24 petitioner and most other cruise lines.” *Carnival Cruise Lines*, 499 U.S. at 593.
25 “Common sense dictates that a ticket of this kind will be a form contract the terms of
26 which are not subject to negotiation, and that an individual purchasing the ticket will
27 not have bargaining parity with the cruise line.” *Id.*
28

1 Still, the United States Supreme Court held that the forum selection agreements
2 were enforceable. After all, a cruise ship “typically carries passengers from many
3 locales,” and without a forum selection clause would be “subject...to litigation in
4 several different fora.” *Id.*

5 Additionally, a clause establishing ex ante the forum for dispute
6 resolution has the salutary effect of dispelling any confusion about
7 where suits arising from the contract must be brought and defended,
8 sparing litigants the time and expense of pretrial motions to determine the
9 correct forum and conserving judicial resources that otherwise would be
10 devoted to deciding those motions. Finally, it stands to reason that
11 passengers who purchase tickets containing a forum clause like that at
12 issue in this case benefit in the form of reduced fares reflecting the
13 savings that the cruise line enjoys by limiting the fora in which it may be
14 sued.

15 [Id.]

16 Likewise, LendingTree maintains a website available to the consumers of 50
17 States. Absent a working forum selection clause, LendingTree would be required to
18 litigate in all 50 States. Explicitly choosing North Carolina at the front end of the
19 transaction reduces the uncertainty on all sides. Lastly, any consumer obtaining
20 mortgage quotes at no charge from LendingTree is enjoying the benefits made
21 possible by LendingTree’s containment of litigation cost. Therefore, the LendingTree
22 forum selection provision is enforceable pursuant to *Carnival Cruise Lines*.

23 **C. The Burden is on Plaintiffs to Show Enforcement of the Forum**
24 **Selection Clause is Unreasonable.**

25 In the Ninth Circuit, a “heavy burden” falls to the opponent of a forum selection
26 clause to show that the clause is unreasonable. *Argueta*, 87 F.3d at 325.

27 A forum selection clause is unreasonable if (1) its incorporation into the
28 contract was the result of fraud, undue influence, or overweening bargaining power;
(2) the selected forum is so gravely difficult and inconvenient that the complaining
party will for all practical purposes be deprived of its day in court, or (3) enforcement
of the clause would contravene a strong public policy of the forum in which the suit is
brought.

1 [Id. (quotation marks and citations omitted).]

2 Plaintiffs cannot meet this burden.

3 **1. The Contract Chooses North Carolina as a Forum Because**
4 **LendingTree's Operations are in North Carolina.**

5 As Judge Whitney found in his opinion, each Plaintiff had a duty to read the
6 Terms of Use, which contained no unfair surprise. Far from being the result of fraud,
7 undue influence, or overweening bargaining power, the selection of North Carolina as
8 the exclusive forum for any litigation between a consumer and LendingTree is natural.
9 LendingTree's "principal office street address" is 11115 Rushmore Drive, Charlotte,
10 North Carolina 28277. Limited Liability Company Annual Report, filed by
11 LendingTree LLC with North Carolina Secretary of State, Exhibit "3" to RJN. North
12 Carolina therefore has a substantial relationship to this dispute. Cf., *Provencher v.*
13 *Dell*, 409 F.Supp.2d 1196, 1201 n.5 (C.D. Cal. 2006) (enforcing Texas choice of law
14 where Dell was principally located in and selling goods from Texas).

15 LendingTree's means in offering the Terms of Use were entirely proper. As
16 Judge Whitney found reviewing the same Terms of Use, Attachment B, there are "no
17 facts indicating unfair surprise," Exhibit "1: to RJN at T58:14-15, "plaintiffs were able
18 to peruse LendingTree's website at their leisure," T58:19-20, and "Plaintiffs have not
19 demonstrated a lack of meaningful choice," as LendingTree "has a number of major
20 competitors, any of which were just as available to Plaintiffs," T59:21-24.
21 LendingTree users have ample time – up to a half hour – to review the Terms of Use,
22 or any other provision of the LendingTree website, before deciding whether to
23 proceed. Plaintiffs' free, unhurried choices led each to agree to the Terms of Use, and
24 bind each of them not to sue LendingTree outside of LendingTree's home forum of
25 Mecklenburg County, North Carolina.

26 **2. North Carolina is an Available and Convenient Forum.**

27 As noted above, of the nine Plaintiffs before the Court, **not one is a California**
28 **resident**. Plaintiffs are from, for example, Florida (*Shaver*), Georgia (Baker and

1 Woods), New York (*Garcia*), Pennsylvania (*Swearingen*), and Virginia (*Paxton-*
2 *Collins*). These East Coast Plaintiffs cannot seriously object on the grounds of time or
3 expense to having their cases heard in North Carolina instead of the much-more
4 distant California. Moreover, each Plaintiff seeks to represent a national class,
5 including North Carolina residents. Plaintiffs can hardly seek to represent North
6 Carolina residents and object to doing so in North Carolina.

7 **3. North Carolina Provides Adequate Remedies.**

8 Plaintiffs may object that a North Carolina court will apply North Carolina law
9 (per the TOU), and deny Plaintiff's California claims a day in Court. Even if Plaintiff
10 is right that the Court will apply North Carolina law, per the TOU, this does not deny
11 Plaintiff any substantive right. North Carolina's laws protect Plaintiffs at least as well
12 as do California's. In fact, North Carolina's main consumer protection statute
13 provides a greater recovery for successful plaintiffs. A successful §17200 plaintiff is
14 entitled only to injunctive relief, including restitution. By contrast, a consumer
15 recovering under North Carolina's Unfair Competition or Trade Practices Act can
16 recover civil damages and is automatically entitled to a trebling of any award. N.C.
17 Gen. Stat. § 75-16. Therefore, in the unlikely event that Plaintiffs have a cognizable
18 claim at all, application of North Carolina's consumer protection laws will not
19 prejudice Plaintiffs. Even if the North Carolina court decides to apply North Carolina
20 law, that will not change North Carolina's status as an adequate forum.

21 **4. Enforcement of the Forum Selection Clause Will Contravene** 22 **No Strong Public Policy of California.**

23 Plaintiffs may claim that holding them to their forum selection will somehow
24 injure California's interest in the prosecution of California statutory claims. Even if
25 Plaintiffs were precluded from asserting California claims in North Carolina court,
26 Plaintiffs' California statutory claims are transparent window dressing. For example,
27 Plaintiffs bring suit under §1798.80. The explicit text of that statute notes, "It is the
28 intent of the Legislature to ensure that personal information *about California residents*

1 is protected.” §1798.81.5(a) (emphasis added). The statute then imposes obligations
2 on a “business that owns or licenses personal information *about a California resident*”
3 and “a business that discloses personal information *about a California resident.*”
4 §1798.81.5(b)-(c) (emphasis added). California’s Legislature did not enact this statute
5 to protect the residents of Florida, Georgia, Nevada, New York, Oklahoma,
6 Pennsylvania, Utah, and Virginia, and, from a constitutional sense, it is doubtful that
7 California would have the authority to regulate transactions between a North Carolina
8 company and resident of another state. No harm is done to California’s fundamental
9 policies by leaving such persons to the remedies available under North Carolina law.⁴

10 Plaintiffs’ §17200 claims likewise do not meet the requirements of that
11 California statute. Since the passage of Proposition 64, §17204 has required a §17200
12 plaintiff to allege that he or she “has suffered injury in fact and *has lost money or*
13 *property* as a result of the unfair competition.” (Emphasis added). None of Plaintiffs
14 has alleged loss of money. Plaintiffs paid no money to LendingTree. None of
15 Plaintiffs has alleged loss of property. Even if an intangible such as personal
16 information is “property” under §17204, Plaintiffs have not *lost* any. Plaintiffs do not
17 allege that they now have no access to information about themselves. Proposition 64
18 was enacted exactly because Californians agreed that, “Frivolous unfair competition
19 lawsuits clog our courts and cost taxpayers.” Proposition 64, §1(c). To permit this
20 suit to stay in California would itself be a frustration of important California public
21 policy against speculative and unripe suits.

22 Plaintiffs’ counsel in this very case has already litigated and lost the issue of
23 whether §17200 permits recovery on increased risk of identity theft. See, *Ruiz v. Gap*,

24 _____
25 ⁴ LendingTree is also exempt from §1798.80. As a licensed mortgage broker, LendingTree is
26 subject to the California Financial Information Privacy Act of 2003. Per §1798.81.5(e)(2), all such
27 financial institutions are exempt from §1798.80 requirements. The California Financial Information
28 Privacy Act has no private right of action. The inability of *these Plaintiffs* to point to any
meaningful and enforceable interest that they can pursue against LendingTree under California law
is relevant to the lack of any strong interest of California in this case.

1 *Inc.*, 540 F.Supp.2d 1121, 1127 (N.D. Cal. 2008). In *Ruiz*, plaintiff applied for a job
2 at The Gap. The Gap subsequently notified Ruiz that information from his application
3 had been stolen. *Ruiz* sued under §17200. The Gap moved for judgment on the
4 pleadings. As to the §17200 claim, the Court granted defendant's motion:

5 *Ruiz* has lost neither money nor property. His attempt to allege that the
6 theft of the laptops somehow constitutes a loss of property because his
7 personal information was contained on the laptop is unavailing. Nor has
8 *Ruiz* presented any authority to support the contention that unauthorized
9 release of personal information constitutes a loss of property. Without
any such authority, the Court is constrained to find that Ruiz has not
alleged any loss of property and therefore has not stated a valid claim
under §17200.

10 [*Id.*]

11 Plaintiffs' §17200 case, already debunked by a federal court in California, can
12 provide no excuse for Plaintiffs' non-compliance with the parties' choice of venue.
13 No "strong public policy" of California will be offended by enforcement of this
14 Motion.

15 **IV. CONCLUSION**

16 Therefore, LendingTree asks that its Motion to Dismiss under Rule 12(b)(3) be
17 granted, and that LendingTree be dismissed from all of the above-captioned suits. In
18 the alternative, LendingTree would consent to the transfer under 28 U.S.C.A.
19 §1404(a) of these actions to the United States District Court for the Western District
20 of North Carolina, which encompasses Mecklenburg County.

22 DATED: September 12, 2008

REED SMITH LLP

24 By /s/ Felicia Y. Yu
25 Felicia Y. Yu
26 Attorneys for Defendant
LENDINGTREE, LLC